STATE OF MICHIGAN

COURT OF APPEALS

CLINTON BEARSS, Plaintiff-Appellant,	UNPUBLISHED December 20, 2011
v	No. 300822 Oakland Circuit Court
CITY OF CLAWSON, Defendant-Appellee.	LC No. 2010-106825-NO

Before: MURPHY, C.J., and JANSEN and OWENS, JJ.

PER CURIAM.

In this negligence action, plaintiff appeals by right the trial court's grant of summary disposition in favor of defendant. We affirm.

Plaintiff was struck by a falling tree limb as he stood on the publicly owned strip of land located between the street and the sidewalk in the city of Clawson. He argues that the defective tree branch was part of the "highway," MCL 691.1402, and that he therefore pleaded a claim of negligence in avoidance of governmental immunity. We disagree.

The grant or denial of a motion for summary disposition is reviewed de novo. *McLean v McElhaney*, 289 Mich App 592, 596; 798 NW2d 29 (2010). "Similarly, the applicability of governmental immunity is a question of law that this Court reviews de novo." *Id*. A plaintiff who asserts a claim against a governmental agency "'must plead in avoidance of governmental immunity'" by "stat[ing] a claim that fits within a statutory exception . . . ." *Kendricks v Rehfield*, 270 Mich App 679, 681; 716 NW2d 623 (2006) (citation omitted).

Defendant's motion for summary disposition was properly granted. "[T]he immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." *Nawrocki v Macomb Co Rd Comm'n*, 463 Mich 143, 158; 615 NW2d 702 (2000). Under the highway exception, a governmental agency with jurisdiction over a particular highway has a duty to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1). The term highway is defined as "a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway," but does not include "alleys, *trees*, and utility poles." MCL 691.1401(e) (emphasis added). In this case, plaintiff was hit in the head by a falling tree branch. The statutory definition of highway, found in MCL 691.1401(e), plainly states that the term highway does not include trees. Plaintiff does not even suggest that his injuries were

somehow caused by a defect in the roadway or sidewalk, or by anything other than the falling tree branch.

Plaintiff relies heavily on *McKeen v Tisch (On Remand)*, 223 Mich App 721; 567 NW2d 487 (1997). The *McKeen* Court held that, pursuant to *Pick v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996), overruled by *Nawrocki*, 463 Mich at 180, the plaintiff, who was killed on the road by a tree limb that had been severed a month earlier, had a valid claim that was not barred by governmental immunity. *McKeen*, 223 Mich App at 723-726. The *McKeen* Court ultimately observed that the "tree limb was a condition that directly affected vehicular travel on the improved portion of the roadway so that such travel was not reasonably safe." *Id.* at 724.

However, this reasoning of *McKeen* no longer applies. Three years after *McKeen* was decided, our Supreme Court overruled *Pick* and resolved to "return to a narrow construction of the highway exception predicated upon a close examination of the statute's plain language, rather than merely attempting to add still another layer of judicial gloss to those interpretations of the statute[.]" *Nawrocki*, 463 Mich at 150, 180. The *Nawrocki* Court held that the duty of government entities under the highway exception "is only implicated upon their failure to repair or maintain the *actual physical structure of the road bed surface, paved or unpaved, designed for vehicular travel*, which in turn proximately causes injury or damage." *Id.* at 183 (emphasis added).

Given our Supreme Court's decision in *Nawrocki* and its overruling of *Pick*, we conclude that the broad reading of the highway exception advanced by the *McKeen* Court is no longer good law. We note that the *McKeen* Court also relied upon another case, *Miller v Oakland Co Rd Comm*, 43 Mich App 215; 204 NW2d 141 (1972), for the proposition that a falling tree could give rise to a governmental entity's liability under the highway exception. *McKeen*, 223 Mich App at 724-725. However, *Miller* was decided in 1972, prior to the statutory amendments that defined the term highway to exclude trees. See 1986 PA 175, effective July 7, 1986. Plaintiff's reliance on *McKeen* is misplaced, and does not constitute a valid ground to disregard the plain language of the statute. The unpublished opinions of this Court on which plaintiff relies are similarly unpersuasive. Quite simply, a tree limb is not part of the highway, MCL 691.1401(e), and plaintiff therefore failed to plead a claim in avoidance of governmental immunity. The trial court did not err by granting summary disposition in favor of defendant.

Because plaintiff failed to plead in avoidance of governmental immunity, we need not consider whether defendant knew or reasonably should have known of the defective tree limb as would have been required by MCL 691.1403.

Affirmed. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Donald S. Owens